No. 12,094

IN THE

United States Court of Appeals

For the Ninth Circuit

PAUL FIX,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT.

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STATEMENT OF BASIS OF JURISDICTION.

Appellant, Paul Fix, a naturalized citizen of the United States of America, residing at Lafayette, Contra Costa County, California, appeals from a final judgment (R. 36) of the United States District Court for the Northern District of California, Southern Division, entered against him in a suit in equity canceling his certificate of naturalization upon the ground that the same was illegally and fraudulently procured by appellant.

A complaint to revoke appellant's citizenship was filed on April 13, 1943 (R. 1). A final judgment of the United States District Court canceling appellant's certificate of naturalization was entered on April 7, 1944 (R. 36), based upon findings against the German

American Bund and against appellant (R. 27). Appellant's motion for a new trial (R. 38) was denied April 24, 1944 (R. 40). On July 26, 1944, appellant filed his notice of appeal to this Court (R. 41). The opinion of the United States District Court is reported in 54 Fed. Supp. 63.

The District Court had jurisdiction to entertain the bill under the provisions of Title 8, U.S.C.A., Section 738 and Title 28 U.S.C.A., Section 41 (1), now Title 28 U.S.C.A., Sections 1331 and 1345.

This Court has jurisdiction on appeal to review the judgment of the Court below under the provisions of Title 28, U.S.C.A., Section 225 (2) first, now title 28 U.S.C.A., Section 1291.

Under the sections last quoted the judgment is a final judgment and is, therefore, appealable.

The pleadings necessary to show the existence of the jurisdiction of this Court are:

The complaint (R. 1);

The answer (R. 2);

The amended answer (R. 14);

Findings of Fact and Conclusions of Law (R. 27);

Judgment (R. 36);

Notice of Appeal (R. 41).

SPECIFICATION OF ERRORS RELIED UPON.

Appellant contends that the trial Court erred in the following particulars:

1. That the evidence is insufficient to justify the judgment;

2. That the judgment is contrary to the evidence;

3. That the judgment is contrary to law;

4. That the trial Court erred in denying appellant's motion for a new trial;

5. That the evidence is insufficient to justify the making of the following numbered Findings of Fact:

Finding No. 12 (R. 32);
Finding No. 13 (R. 33);
Finding No. 14 (R. 33).

6. That the evidence is insufficient to justify the following Conclusion of Law:

Conclusion of Law No. 2 (R. 34).

STATUTE, THE VALIDITY AND APPLICATION OF WHICH IS INVOLVED.

Title 8 U.S.C.A., Sec. 738 (a), which provides as follows:

> (a) "It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 701 in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were illegally procured."

STATEMENT OF CASE.

(Consolidated Bund Trial.)

The present case, together with twenty-seven (27) others, was consolidated for the sole purpose of receiving evidence as to the principles and practices of the German American Bund (opinion of District Judge, 54 Fed. Supp. (2d) 63). The record in that trial was voluminous. On December 20, 1948, an order was made by this Honorable Court dispensing with the printing of the reporter's transcript and exhibits (R. 67). The consolidated trial was a trial of the Bund itself and not of the individual defendants. The Government produced a number of witnesses to prove that the German American Bund and its affiliated organizations were subversive in design and character. Among the witnesses were men who admittedly were leaders in the Bund, some of whom were released from prison in order to testify. Appellant was in no way connected with any of these notorious leaders, nor was it proved that he had ever become acquainted with them or actively participated in their subversive practices. The record in this case shows only that appellant attended meetings of the German American Bund and is absolutely devoid of any evidence showing that appellant knew about the principles and practices of that organization or subscribed to them.

STATEMENT OF CASE.

(Appellant's Individual Trial.)

Appellant, Paul Fix, is the defendant in an action brought by the United States to revoke his citizenship pursuant to Section 338 of the Nationality Act of 1940 (54 Stat. 1158; U. S. Code, Title 8, Section 738). After separate trial before the United States District Court of the Northern District of California, Southern Division, on issues concerning appellant's actions and conduct, the trial Court prepared and filed its Findings of Fact and Conclusions of Law (R. 27) holding that the Certificate of Naturalization issued to appellant had been illegally and fraudulently procured, and on March 31, 1934, the judge of said Court signed a judgment directing cancelation of the Certificate of Naturalization issued to appellant (R. 36).

Appellant moved the trial Court for a new trial (R. 38) and on April 28, 1944, an order was made denying said motion (R. 40). On July 26, 1944, appellant filed his Notice of Appeal from said judgment (R. 41) and on August 22, 1944, filed his statement of points upon which appellant intended to rely upon appeal (R. 46).

SUMMARY OF EVIDENCE.

Appellant, Paul Fix, was born at Haslach, Germany (R. 77), on January 26, 1905. Before coming to this country he worked as a farmer (R. 77). His education received in Germany was equivalent to high

school training in this country (R. 77). He migrated to the United States in 1928, arriving in San Francisco on December 17th of that year (R. 77). He established his residence in San Francisco and has lived in the vicinity of the Bay Area ever since, at the present time being a resident of Lafayette, Contra Consta County, California. On March 4, 1929, he started to work as an apprentice baker (R. 78) and has continued to work at that trade ever since that time, save for a short period of time, during the year 1939, when he engaged in a tavern and restaurant business (R. 79). For the past few years appellant has been engaged in the bakery business at Lafayette, Contra Costa County, California.

Appellant married one Mary Winkler (R. 80), who died in childbirth in 1932 (R. 81). The child survived the mother and after his wife's death appellant gave the child for adoption (R. 83). In October of 1933, appellant married Meta Schlegel in San Francisco, which marriage was dissolved by decree of divorce six years later (R. 84). In 1940, appellant met his present wife in Modesto, California (R. 326), and shortly thereafter appellant and his present wife, Thelma Fix, started a bakery business in Berkeley, California, as co-partners. Appellant and his present wife, Thelma Fix, were married in 1940, and ever since have been, and now are, husband and wife and living together as such.

Appellant filed his declaration to become a citizen of the United States in the United States District Court in and for the Northern District of California,

Southern Division, on June 29, 1929, and his petition for citizenship was filed on September 27, 1935, and on January 6, 1936, an order was made by the aforesaid Court admitting appellant to citizenship (R. 19).

In 1937 appellant made a trip to Germany for the purpose of visiting his folks and the family of his wife (R. 85), arriving in Hamburg on March 1, 1937. While in Germany appellant purchased an automobile and made a trip to France, Switzerland and Austria (R. 358). While in Germany appellant also purchased a rifle. At no time during the entire trip did appellant attend any Bund meetings (R. 356). On two different occasions while in attendance at public meetings appellant called out the words "Drei Liter" instead of "Heil Hitler" in order "not to fall out of line" (R. 109).

In 1936, appellant became a member of the German American Bund (R. 85) principally because he was selling them bakery products (R. 101). He remained a member of that organization for a period of only three months (R. 19). Appellant resigned from the organization because the membership was not being advised by the officers thereof as to what disposition was being made of the dues collected (R. 100). Appellant was never an officer of the German-American Bund or The Friends of New Germany. At no time did he ever wear a uniform. He started to read "Mein Kampf", but found the book too deep for him and did not complete reading the same (R. 96). Appellant at no time distributed any Bund literature, nor was he a speaker at any of their meetings. In Septem-

ber of 1939, in company with other members of the Bund, who shared expenses, he drove his automobile to Los Angeles and while there attended a convention of the Western District of the Bund (R. 114). At the request of the members present at said convention, appellant, with numerous others, sent a telegram to Senator Johnson urging neutrality (R. 117). Appellant attended a Bund picnic in Dublin Canyon during the month of June, 1938, where a Swastika was burned on the hill side. He read the German-American Bund paper, the "Deutsches", the "Weckruf und Beobachter" and the "Free American", which literature was distributed at the Bund meetings (R. 123).

Witnesses for the Government, one of whom had been convicted of a felony (R. 144) testified that in 1942, appellant called President Roosevelt a "warmonger" (R. 145); that appellant had refused to buy war bonds (R. 146) and had stated that the gold in Fort Knox would have no value (R. 146); that he would not aid in the salvage drive (R. 147) and when speaking of Jewish people he applied to them vile and vulgar names (R. 152); that appellant stated that Hitler would take over this country (R. 164) and that all unions should be broken as they were in Germany (R. 181) that in discussing the bombing of Pearl Harbor appellant stated "it suited this country just right" (R. 145); that on occasions when soldiers were marching past his place of business appellant would remark "there goes the condemned row; they are going off to slaughter" (R. 145); that in discussions pertaining to his being drafted he stated "that

he would sit in the guard house before he would serve in the Army"; that Hitler was going to take over this country (R. 164); that all Germans in this country were armed and were prepared to take over South America and the United States (R. 181); that in July of 1940, he owned a phonograph and loud speaker together with several records of German music, one of which was a German march which ended with the words "Heil Hitler" (R. 174); that when Germany took over this country they were going to dispose of all the Jewish people and General Mosley was to be the head man (R. 175), at which time we would have a much better government (R. 175); that since he had been in Lafayette, appellant had been heard to state "if President Roosevelt had kept his big mouth shut the United States would not have been in the war" (R. 185); that in 1937, after his return from Germany appellant stated "we may need a Hitler here to change our conditions" (R. 200) and he did not want any Jewish salesmen calling on him (R. 202); that in 1940 he was the owner of three guns, including a tear gas gun (R. 174).

Appellant produced several witnesses who testified that he bore a good reputation in the community in which he lived (R. 212; 232; 254; 256; 267; 301; 322) that he cooked doughnuts for the Red Cross (R. 206); that he placed patriotic advertisements in the local newspapers (R. 213; 219; 315); that he made contributions towards the war effort (R. 221); that he never discussed the war or politics (R. 232) or made any disloyal statements (R. 234; 241, 248; 252; 255;

266; 270; 278; 282); that he was a hardworking baker, working fourteen to sixteen hours a day (R. 249); that he gave a stove to the soldiers stationed in the vicinity in which he lived (R. 264); that he did not display any German flags or decorations in his home (R. 285) or pictures of Hitler (R. 249; 300); that he always conducted himself as one who was proud to be a citizen of the United States (R. 256); that he never said anything about Germany or discussed the form of government under Hitler (R. 270); that the Germans had been mislead by the Nazi Party (R. 271); that he never made any derogatory statements against the Government of the United States (R. 270); that in April, 1943, after the bombardment of Cologne, appellant remarked "the Germans were getting back what they were dishing out" (R. 276); that he gave a discount to St. Mary's Pre-flight School on all bakery goods sold to the school; that he always said if he were inducted into the Army that he would fight for his country (R. 328); that "he had no hatred for race, color or creed" (R. 328) that he gave his grease, rubber and tin cans to the salvage drive (R. 341); that he purchased war bonds (R. 352); that he promised in the event of disaster to turn out 2500 loaves of bread a day (R. 369); that he gave his dog to the Army (R. 370); that he did not think that Germany had the right to declare war on the United States (R. 389).

In brief the plaintiff's case against appellant is as follows:

(1) He attended meetings of the Friends of New Germany, without being a member thereof;

(2) He was a member of the German American Bund for a period of three months;

(3) While a member of the Bund he attended meetings, saw the Swatiska displayed; read literature distributed at the meetings and listened to lectures given by the Bund leaders;

(4) Attended the Bund picnic in Dublin Canyon;

(5) Attended the convention of the Gautag West in Los Angeles;

(6) Joined with others in sending a telegram to Senator Johnson urging that United States remain neutral in the European War;

(7) He was the owner of three guns;

(8) He was the owner of a phonograph and several records of German Songs, including a German march which ended with the words "Heil Hitler";

(9) He expressed himself on certain matters concerning the Government, the War, the President and members of his Cabinet and the salvage drive which a native born citizen could have done with immunity.

ARGUMENT.

THE JUDGMENT IS ERRONEOUS BECAUSE IT IS NOT SUPPORTED BY EVIDENCE SUFFICIENT TO SATISFY THE CLEAR AND CONVINCING EVIDENCE RULE.

It is appellant's position in seeking a reversal in this case, that the evidence is insufficient to sustain the judgment of the trial Court in that the same falls short of the proof required under the "clear and convincing evidence rule". Furthermore, appellant respectfully submits, even with all the inferences and presumptions being in favor of the judgment as rendered, an examination of the record will disclose that the only acts and declarations of appellant upon which the trial Court entered judgment were acts and declarations that appellant was entitled to do and make as a citizen of the United States and which in no way reflect a state of mind on appellant's part incompatible with his oath of allegience made on the date of his naturalization. Our Courts in the past have so often announced the degree of evidence sufficient to sustain a judgment of denaturalization in cases of the present type that the same has in reality become an elementary principle of law. In *Schneiderman v. United States,* 320 U. S. 118 (87 Law. Ed. 1796), the Supreme Court said:

> "To set aside such a grant the evidence must be 'clear, unequivocal and convincing'—'it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt.' "

Similar language more forcibly stated can be found in:

Baumgartner v. U. S., 322 U. S. 655 (88 Law. Ed. 1525);

Knauer v. U. S., 328 U. S. 654 (90 Law. Ed. 1500);

Bergmann v. U. S. (C.C.A.-9), 144 Fed. (2d) 34;

Scheurer v. U. S. (C.C.A.-9), 150 Fed. (2d) 535.

And in the very recent case of *Klapprott v. United States,* decided January 17, 1949, and reported in Vol. 93, Supreme Court Law. Ed. Advance Opinions 279, the Supreme Court even extended the rule announced in the previously cited cases and held that the required proof in cases of this type must be substantially identical with that required in a criminal case, that is, proof beyond a reasonable doubt, and this language was used by the Court when the defendant allowed his default to be entered. In that case the Supreme Court said at page 287:

> "This Court has long recognized the plain fact that to deprive a person of his American citizenship is an extraordinarily severe penalty. The consequences of such a deprivation may even rest heavily upon his children. 8 USCA Sec. 719, 2 FCA title 8, Sec. 719. As a result of the denaturalization here, petitioner has been ordered deported. 'To deport one who so claims to be a citizen obviously deprives him of liberty, * * * It may result also in loss of both property and life; or of all that makes life worth living.' Ng Fung

> Ho v. White, 259 US 276, 284, 66 L ed 938, 942, 42 S Ct 492. Because denaturalization proceedings have not fallen within the technical classification of crimes is hardly a satisfactory reason for allowing denaturalization without proof while requiring proof to support a mere money fine or a short imprisonment.
>
> Furthermore, because of the grave consequences incident to denaturalization proceedings we have held that a burden rests on the Government to prove its charges in such cases by clear, unequivocal and convincing evidence which does not leave the issue in doubt. Schneiderman v. United States, 320 US 118, 158, 87 L ed 1796, 1819, 63 S Ct 1333. This burden is substantially identical with that required in criminal cases—proof beyond a reasonable doubt. The same factors that caused us to require proof of this nature as a prerequisite to denaturalization judgments in hearings with the defendant present apply at least with equal force to proceedings in which a citizen is stripped of his citizenship rights in his absence. Assuming that no additional procedural safeguards are required, it is our opinion that courts should not in Sec. 738 proceedings deprive a person of his citizenship until a Government first offers proof of its charges sufficient to satisfy the burden imposed on it, even in cases where the defendant has made default in appearance."

See also *U. S. v. Kusche* (D.C. Cal. 1944), 56 Fed. Supp. 201 and *U. S. v. Korner* (D.C. Cal., 1944), 56 Fed. Supp. 242, where U. S. District Judge Pierson Hall dismissed twenty-six (26) complaints similar to

the instant one. No appeal was taken from his decision.

Appellant respectfully urges that there is nothing in the evidence that justified the judgment in the instant case. The record is devoid of any evidence which even tends to show that at the time of his naturalization in 1936 appellant retained even a spark of allegiance to Germany. Hs activities and expression have not been incompatible with allegiance to this Government. The judgment in this case is based solely upon the ground, and upon that ground alone, that from the acts and declarations of the appellant since the date of his naturalization, which he was entitled to make as an American citizen, there can be imputed to him a mental reservation of foreign allegiance. Such is not the law and is wholly repugnant to the rule announced in the previously cited cases. A comparison will properly disclose that the evidence is insufficient in the instant case to warrant the judgment entered by the trial Court finding that this appellant procured his certificate of naturalization fraudulently and illegally. The judgment in the instant case is based solely on "proof by implication", the type of proof so strongly disapproved of in the *Schneiderman* case.

CONCLUSION.

Appellant respectfully submits that the evidence in this case does not justify the judgment of the trial Court and appellant respectfully urges that the decree canceling his citizenship be reversed.

Dated, San Francisco, California,
March 2, 1949.

Respectfully submitted,
EUGENE H. O'DONNELL,
Attorney for Appellant.